

United States District Court
Southern District of Texas
FILED

2H

APR 25 2001

Michael N. Milby
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

RAQUEL O. RODRIGUEZ
AND JOSE L. RODRIGUEZ

VS.

RIDDELL SPORTS, INC.
RIDDELL, INC.
ALL AMERICAN SPORTS CORPORATION
D/B/A RIDDELL/ALL AMERICAN
AND CHRIS HOODMAN

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CIVIL ACTION NO. B-CV-96-177

DEFENDANT, ALL AMERICAN SPORTS CORPORATION D/B/A RIDDELL/ALL
AMERICAN'S MOTION FOR JUDGMENT ON PLEADINGS AND
MEMORANDUM IN SUPPORT THEREOF

TO THE HONORABLE JUDGE OF SAID COURT:

' Now comes All American Sports Corporation d/b/a Riddell/All American and files this its Motion for Judgment on the Pleadings pursuant to F.R.C.P. 12 (c) and moves the court to enter Judgment in its favor as Plaintiffs have failed to state a cause of action upon which they can recover and this party is entitled to judgment as a matter of law.

I.

Plaintiffs' statement of contention in Proposed Pretrial Order 4-20-01, 5(a) and (b) state a claim against "All American Sports Corporation d/b/a Riddell/All American for negligence and gross negligence." Plaintiff abandoned such cause of action before submission of the case to the jury and are therefore precluded from attempting to reassert it at this time. "For the record, Plaintiffs are requesting contrary to my earlier representations, that the jury be charged only with regard to strict liability as alleged

Jose Rodriguez' claim." Mr. Blackburn: SF 1327-28.

II.

Alternatively, under the substantive law of Texas, Plaintiff has failed to state a cause of action under negligence because under Texas law a maintenance contract does not impose on the contractor responsibility to upgrade a product. Muniz v. Ransomes Am. Corp., 921 F.Supp 438, 442(S.D. Tex.1995), aff'd, 81 F.3rd 154 (5th Cir. 1996). Where there is no duty there can be no negligence.

The essential elements of actionable negligence are the existence of a duty on the part of one to another; the breach of that legal duty; injury to the party to whom the duty is owed as a proximate result of the breach. Rosas v. Buddies Food Store, 518 S.W.2d 534 (Tex.1975) and cases cited therein. Absent the showing of any one of these elements, no liability can arise from alleged negligence. Graff v. Beard, 858 S.W.2d 998, 919-920 (Tex.1993). Moreover, whether a duty exists under a given set of facts and circumstances is a question of law for the Court. Bird v W.L.W., 868 S.W.2d 767, 769 (Tex. 1994).

As the 5th Circuit of Appeals stated in its opinion in this case: "....even if hypothetically, Plaintiffs had made a negligence claim against All American for not using the new foam, to maintain the action the contractor must have a duty to enhance the product. All American Sports Corporation d/b/a Riddell/All American's contract with the school specifically said that it did not have that duty. All American Sports Corporation d/b/a Riddell/All American does not undertake to change or modify the design, construction, material or fitness of the athletic equipment herein listed its (sic) only obligation being to recondition such equipment as herein specified." See exhibit 1.

Rodriguez v Riddell Sports, Inc., et al, 242 F.3d. 567, (5th Cir. 2001) at 575.

Since there is no legal duty owed by All American Sports Corporation d/b/a Riddell/All American to Plaintiffs, their negligence and gross negligence claim fails as a matter of law entitling this defendant to Judgment on the Pleadings.

WHEREFORE, PREMISES CONSIDERED, All American Sports Corporation d/b/a Riddell/All American respectfully requests this Court grant its Motion for Judgment on Pleadings and that Plaintiffs take nothing against this party and for such other and further relief, general, special, legal and equitable to which this party may show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

This is to certify that I had a conference with Plaintiffs' counsel, Rex Blackburn, and he refused to agree to this motion.



Robert Summers

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above was forwarded by telefax transmission and certified mail, return receipt requested to counsel of record on this the 25th day of April, 2001.

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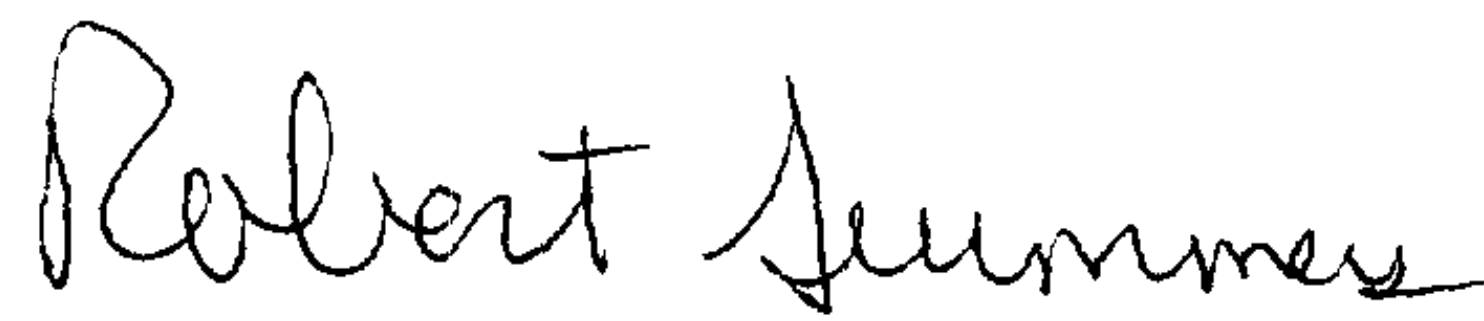
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A handwritten signature in cursive script that reads "Robert Summers". The signature is written in dark ink and is positioned above a horizontal line.

Robert Summers

04/25/01 10:33A P.002

01/05/99 10:14 FAX 1 773 794 8155

RIDDELL

Nov. 4. 1998 4:32PM

RI LL ALL AMERICAN

No. 1615 P. 2/9

DEC 27 1998



ALL AMERICAN

RECONDITIONERS OF TEAM ATHLETIC EQUIPMENT



MAIN OFFICE
1400 TAYLOR STREET
ELYRIA, OHIO 44024
(216) FOOTBALL (800-8285)
(800) 278-8888
BELTON, MO 64013
(816) 881-0004

BURGESS TOWN, PA 15021
(412) 847-8888
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FRANKLIN PARK, IL 60131
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SAN ANTONIO, TX 78228
(800) 878-8844
UNION CITY, CA 94587
(800) 878-7578

SUFFALO, NY 14213
(716) 888-8100
ST. CATHARINES, ONTARIO L2A 4K5
(800) 871-1483

SALESMAN HOUDMANN		DATE 12-15-94		How Shipped 35TT		No. Bags 2	
SCHOOL Los Fresnos High School				INVOICE NO. 106			
STREET 1 Mile N. Hwy 100 E. Pecosville				TERMS 1% 10 Days, Net 30			
CITY/STATE/ZIP Los Fresnos TX 78566				Fall Dating - no discount			
OFFICIAL TITLE LENN AMAYA A.D.							
ATHL DEPT 5-93-10							
APPROX. RETURN DATE 5-1-95		Equip. Beyond Econ. Repair Disagree					
<input checked="" type="checkbox"/> REPLACEMENT EQUIPMENT * <input type="checkbox"/> Helmet <input type="checkbox"/> Sh. Pads <input type="checkbox"/> Other INVOICE SEPARATE YES NO <input checked="" type="checkbox"/> ATTACH REPLACEMENT ORDER *				<input type="checkbox"/> RSCAL YEAR RESTRICTIONS Invoice Before _____ Invoice After _____			
Code	Qty	Mfg.	Model	Est. Parts Needed	Est. S/B	Est. Total Price All (As Req.) Only	Est. Total Price All (As Req.) Only
168	28	Riddell	VSR-4	2	20	M 4509204	2280
162	27	Riddell	VSR-3	4		4509304	2380
77	38	Bike	7700	5		4508504	2280
83	13	Mampro	2001	2		4508704	2280
(Replace all KRA-Lites)							
TOTAL		106	SHELL <input type="checkbox"/> Padded <input type="checkbox"/> Unpadded <input type="checkbox"/> Denim <input type="checkbox"/> Anthers		Face Prot. Color Change <input type="checkbox"/> Yes <input type="checkbox"/> No		
			CONDITION: <input checked="" type="checkbox"/> Scuffing <input type="checkbox"/> Piled <input type="checkbox"/> Stripes <input type="checkbox"/> TV, etc.		New Face Protector Color <input type="checkbox"/> Yes <input type="checkbox"/> No		
27		106	Color To Be Painted High Gloss		Return All Helmets Gold. Check color of Gold & match.		
27			Buff and Shine As Req.		TAKE KRA-Lites OFF AND Return to go.		
			Shoulder Pads: <input type="checkbox"/> Moulded <input type="checkbox"/> Cleated <input type="checkbox"/> New Cleat: Yes No				
			Ribs Pads:				
			Rib Pads (w/straps only): <input type="checkbox"/> Rib Pads Pieces				
			Girdles: <input type="checkbox"/> Reg. <input type="checkbox"/> Plan <input type="checkbox"/> Inserts <input type="checkbox"/> All <input type="checkbox"/> Some				
			Jerseys: <input type="checkbox"/> Reg. <input type="checkbox"/> Plan <input type="checkbox"/> Padded <input type="checkbox"/> Blended <input type="checkbox"/> Color Run Game Pres.				
			Pants: <input type="checkbox"/> Reg. <input type="checkbox"/> Plan <input type="checkbox"/> Padded <input type="checkbox"/> Blended <input type="checkbox"/> Color Run Game Pres.				
			Stadium Caps:				

I hereby authorize ALL AMERICAN to recondition the athletic equipment listed, subject to conditions printed on the reverse side. I understand that ALL AMERICAN reserves the right to reject any equipment defective, damaged, or not meeting the expense of repair.

An estimate on any reconditioning order may vary 10-15 percent based on the above mentioned quantities. Defective parts discovered during the testing and reconditioning process will be returned at their respective unit prices. Defective protective parts, in excess of the estimated quantity, will be returned for verification.

ALL AMERICAN is not responsible for actual or assumed estimates. Company will apply its standard charge for transportation and handling. Sales tax will be added if applicable. This amount is not included in the estimate and will be added to the invoice.

ESTIMATE MAY VARY AS EXPLAINED ABOVE
Total Before Transportation & Sales Tax If Applicable

Authorized Signature **[Signature]** Title **A-D** Phone **214-233-3300**

3833

All Amer

003

No. 1615 P. 39

CONDITIONS OF CONTRACT

This Contract is subject to all assumptions and representations of the CENSOPEP of the State of Ohio. The CENSOPEP's administrative and security of the equipment being used, within information specified by the, shall be the responsibility of the CENSOPEP. This Contract represents the main agreement between the parties and no representation of the CENSOPEP has been made to make any oral or written agreement which is not contained herein. Please print name of signatory and title.

***Enter GRAND TOTAL in the price block on the front of this order**

Allamer 2